IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 74

JOHN FRANCIS PETERS,

Appellant,

v.

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANT

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Opinion Below

The opinion of the Court of Appeals of the State of New York (R. 46-56) is reported at 18 N.Y. 2d 238, 273 N.Y. Supp. 2d 217 (1966).

Jurisdiction

The judgment of the Court of Appeals of the State of New York, was entered on the 7th day of July, 1966 (R. 57-58). A timely Notice of Appeal was served and a

Statement of Jurisdiction was filed on the 10th day of October, 1966. An Order Noting Probable Jurisdiction was entered on the 27th day of March, 1966 (R. 63). The jurisdiction of this Court rests upon Title 28 U.S.C. Section 1257(2), the Court of Appeals of the State of New York having rejected appellant's timely claim that Section 180-a of the Code of Criminal Procedure of the State of New York is invalid on the ground of its being repugnant to the Fourth and Fourteenth Amendments of the Constitution of the United States.

Questions Presented

The following questions are presented by this appeal:

1. Is Section 180-a of the Code of Criminal Procedure of the State of New York, which provides for the stopping, questioning and searching of persons in public places, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States:

(a) Is Section 180-a of the Code of Criminal Procedure of the State of New York, because it permits the search of persons upon suspicion rather than and in the absence of probable cause, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States of America?

(b) Is Section 180-a of the Code of Criminal Procedure of the State of New York, because it permits the arrest of persons upon suspicion rather than and in the absence of probable cause, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States?

(c) Is Section 180-a of the Code of Criminal Procedure of the State of New York as applied to the appellant, in permitting the stopping, questioning and searching of the appellant, repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States?

2. In view of the fact that the search of the appellant and the seizure of evidence from his person was not authorized by a lawfully issued search warrant or conducted pursuant to his consent, or as an incident to a lawful arrest, was the search of the appellant's person and the seizure of evidence therefrom an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States?

Statutory and Constitutional Provisions Involved

1. The statute, the validity of which has been drawn in question, is Section 180-a of the Code of Criminal Procedure of the State of New York, as added by the laws of 1964, Chapter 86, Section 2, effective July 1, 1964. (McKinney's Consolidated Laws of New York, Annotated.) Said statute is as follows:

> "Sec. 180-a. *Temporary questioning of persons in public places; search for weapons.*
>
> 1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

2. The constitutional provisions to which, in appellant's view, the foregoing statutory provisions are repugnant to and in violation of, are as follows:

"U. S. Const., Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const., Amendment XIV

Section 1. All persons born ~~or~~ naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The appellant was arrested on the 10th day of July, 1964, by police officers attached to the Police Department of the City of Mount Vernon, County of Westchester, State of New York. He was charged by said police officers with having violated Section 408 of the Penal Law of the State of New York, the gravamen of said charge being the illegal possession of burglar's tools (R. 13-14). On the 28th day of July, 1964, the appellant appeared before the Court of Special Sessions of the City of Mount Vernon, where a preliminary hearing was had with respect to the charges made against him (R. 13-25).

The stenographic minutes of the preliminary hearing reveal that the People presented two (2) witnesses in support of their case. The People's first witness was one Samuel L. Lasky, a police officer attached to the Police Department of the City of New York (R. 14-22). Officer Lasky testified, in substance, that he resided in a sixth (6th) floor apartment at #465 E. Lincoln Avenue, Mount Vernon, New York, and that those premises consisted of a multiple dwelling, housing approximately one hundred twenty (120) families (R. 14).

It was the testimony of Officer Lasky that on the 10th day of July, 1964, at or about 1:00 p.m. on that day, he observed, through the "peephole" of his apartment door, two (2) men tiptoeing towards the sixth (6th) floor stairway of his apartment building. He further testified that he left his apartment, taking with him his revolver, and ran after the two (2) men, and that he apprehended the appellant between the fourth (4th) and fifth (5th) floors of the aforementioned premises, while the appellant was descending the stairway (R. 15-16).

While Officer Lasky pointed his revolver at the appellant, and while he had the appellant by the shirt collar, he asked the appellant why he was in the premises. The appellant told the police officer, in substance, that he was in the premises in order to visit a girlfriend. Upon being asked by the police officer for the name of the "girlfriend", the appellant refused to divulge the same, stating that the woman in question was a married woman (R. 16, 20, 21).

Officer Lasky further testified on direct examination that he searched the appellant's person and removed therefrom an opaque plastic envelope, which he later opened and which allegedly contained certain tools or instruments adaptable to the commission of burglary (R. 16-18).

On cross examination, Officer Lasky testified that when he "frisked" appellant, he felt something "hard", which did not seem like a gun, which may have felt like a knife, but that he was unable to feel either the length or the width of the object (R. 21-22).

At the conclusion of the hearing, the appellant was held for the further action of the Grand Jury of Westchester County (R. 24-25).

After indictment, the appellant moved for the suppression of certain evidence seized from his person, and for an order permitting him to inspect the Grand Jury minutes herein, or in the alternative, for an order dismissing the indictment (R. 3, 4).

Upon the motion made by the appellant for the suppression of evidence seized from his person, the appellant contended that the search of his person and the seizure of evidence therefrom constituted an illegal search and seizure

in contravention and violation of the provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States of America.

The Court, in denying appellant's motion, sustained the validity of the subject search and seizure upon the authority of Section 180-a of the Code of Criminal Procedure of the State of New York, added by the laws of 1964, Chapter 86, Section 2, effective July 1, 1964. The Court relied upon Section 180-a of the Code of Criminal Procedure of the State of New York despite the fact that the People of the State of New York, in opposing appellant's motion, clearly stated that they did not rely upon said statute (R. 36-41).

Subsequently, and on or about the 30th day of October, 1964, the appellant's motions for the suppression of evidence and the dismissal of the indictment were denied, without a hearing (R. 36-41).

Thereafter, the appellant, having no triable issue of fact, entered a plea of guilty with respect to a violation of Section 408 of the Penal Law of the State of New York as a misdemeanor, while specifically reserving his right of appeal as provided for under Section 813-c of the Code of Criminal Procedure of the State of New York.

On the 5th day of January, 1965, the appellant filed a Notice of Appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and simultaneously therewith, he applied to the County Court of the County of Westchester, State of New York, for a Certificate of Reasonable Doubt, urging among other things, that

(a) Section 180-a of the Code of Criminal Procedure of the State of New York, was on its face, and as applied

to appellant, contrary to and in violation of the express provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States of America.

(b) That Section 180-a of the Code of Criminal Procedure of the State of New York violated the Fourteenth Amendment of the Constitution of the United States of America in that it permitted police officers on the basis of vague, arbitrary and capricious standards to conduct unreasonable searches and to restrain persons of their liberty all without the due process of law.

(c) The appellant contended that the search of his person and the seizure of evidence therefrom was not authorized by a lawfully issued search warrant or conducted pursuant to his consent, or as an incident to a lawful arrest and that therefore, said search and seizure constituted an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States of America.

Thereafter, and on the 13th day of January, 1965, a Certificate of Reasonable Doubt as to the defendant's conviction was granted by the County Court of the County of Westchester, State of New York (R. 43).

Appellant, restating his federal claims, appealed the judgment of conviction to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. On the 6th day of December, 1965, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirmed the judgment of conviction without opinion (R. 45).

Thereafter, the appellant, having first obtained the permission of a judge of the Court of Appeals of the State of

New York, appealed to that Court again repeating his federal claims. On the 7th day of July, 1966, a divided court affirmed the judgment of conviction, 18 N.Y. 2d 238 (1966) (R. 46-58).

Summary of Argument

Section 180-a of the Code of Criminal Procedure of the State of New York authorizes the stopping, questioning and searching of persons in public places without their consent, in the absence of a lawfully issued search warrant, and without the existence of probable cause for believing that the person has committed or is about to commit a crime.

The Court below, in construing the statute, conceded that the statutory standard of "reasonable suspicion" was a lower standard than the Fourth Amendment requirement of *probable cause* (R. 50). It defined the statutory standard of "reasonable suspicion" in vague and amorphous terms which merely call for the exercise of a police officer's intuition, and which fail to provide any objective standard (R. 51). The majority below sought to justify the elimination of the Fourth Amendment standard of probable cause by denominating the search in the instant case a *frisk* and by referring to the arrest of the appellant as a *detention* rather than an arrest. Appellant contends that his arrest and the search and seizure of his person were unlawful and unreasonable, and that semantics cannot be employed to avoid the requirements of the Fourth Amendment. It is the intrinsic nature of the conduct itself, rather than the label, which determines the rule of law to be applied.

Section 180-a of the Code of Criminal Procedure of the State of New York, by eliminating the requirement of *prob-*

able cause and by permitting a prior restraint upon personal liberty before the commission of, and in the absence of any overt criminal act, contravenes both the Fourth and Fourteenth Amendments of the United States Constitution.

The Court below erred in sustaining, independently of Section 180-a of the Code of Criminal Procedure, the search of appellant and the seizure of evidence from his person. A search and seizure cannot be justified or made *reasonable,* in the absence of probable cause, by the mere assertion that the search was a necessary self-protective police measure (R. 48-49). Moreover, the search of appellant was conducted as an incident to an *unlawful arrest* and *assault* committed upon him by the police officer, and as such it far exceeded the bounds authorized by the decision of the New York Court of Appeals in the *Rivera* case as well as the statutory authority set forth in Section 180-a of the Code of Criminal Procedure of the State of New York.[1] No power exists in the Legislature of the State of New York, or in the courts of that state, to diminish, suspend or revoke the rights guaranteed to the people under the Fourth and Fourteenth Amendments of the Constitution.

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[1] *People* v. *Rivera,* 14 N.Y. 2d 441, 252 N.Y. Supp. 2d 458 (1964).

ARGUMENT

I.

A State May Not by Legislative Fiat Authorize the Stopping, Questioning, and Searching of Persons in Public Places Without Their Consent, in the Absence of a Lawfully Issued Search Warrant, and Without the Existence of Probable Cause for Believing That the Person Has Committed or Is About to Commit a Crime.

(a)

The Fourth Amendment requirement of "probable cause"

Although the *reasonableness* or *unreasonableness* of a search and seizure must be decided upon the facts of a given case, the Fourth Amendment of the Constitution of the United States provides a standard for the determination of whether or not a search is constitutionally permissible. The reasonableness of every search, whether made pursuant to a lawfully issued search warrant or conducted in the absence of a search warrant, must be judged in the light of the constitutional requirement that it be predicated upon *probable cause*. The Fourth Amendment provides a basic definition of what constitutes a *reasonable search*, i.e., a search made pursuant to a warrant issued upon *probable cause*.[2]

This Court has, from time to time, enunciated the standard to be applied in determining the reasonableness of a search, not authorized by consent or by a search warrant,

[2] U. S. Const., Amend. IV.

and has left no doubt that such a search is deemed reasonable only if conducted as incident to a lawful arrest, based upon *probable cause* for believing that the defendant has committed or is committing a crime.[3] Although the question as to what constitutes probable cause has been before the Court on many occasions, it is clear that, in the constitutional sense, a reasonable search must always be predicated upon the existence of probable cause whether conducted with or without a warrant.[4]

The instant case raises the question as to whether or not the State of New York can, by legislative enactment, dispense with the Fourth Amendment requirement that a reasonable search be predicated upon probable cause. Appellant contends that no power exists in the Legislature of the State of New York or in the courts of that state to diminish, suspend or revoke the rights guaranteed to the people under the Fourth Amendment.

Section 180-a of the Code of Criminal Procedure of the State of New York authorizes a police officer to search a suspect whenever the police officer "reasonably suspects" that the person has committed or is about to commit any one of certain specified crimes and when the police officer "reasonably suspects that he is in danger of life or limb".

The statute must be construed in the light of the opinion of the Court below and in upholding the validity of Section 180-a of the Code of Criminal Procedure, the Court of Appeals stated:[5]

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[3] *Henry* v. *United States*, 361 U.S. 98, 101 et seq. (1959); *United States* v. *Rios*, 364 U.S. 253, 261-262 (1960); *United States* v. *Rabinowitz*, 339 U.S. 56, 62-63 (1950).

[4] *Wong Sun* v. *United States*, 371 U.S. 471, 478 (1963).

[5] *Winters* v. *New York*, 333 U.S. 507, 514 (1948).

"... in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes" (R. 50).

It is precisely in this area, i.e., the conduct authorized by Section 180-a of the Code of Criminal Procedure—that appellant contends that the statute is repugnant to the express provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States.

Concededly, the statutory standard of "reasonable suspicion" refers to a standard requiring less than probable cause for believing that the person to be stopped and searched has committed or is about to commit a crime.[6] A reading of the majority opinion below leaves no doubt that the New York State Court of Appeals has construed Section 180-a of the Code of Criminal Procedure of the State of New York so as to authorize a *detention* and a *search* on less than probable cause. The Court below defined the statutory standard of "reasonable suspicion" as consisting of the *intuitive knowledge* of the experienced police officer.[7] With all due respect for the opinion of the Court below, appellant submits that an experienced police officer's "intuitive knowledge and appraisal" calls for no

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[6] The Court stated, "The phrase 'reasonable suspicion' provides a defined standard and is, in fact, no less endowed with an objective meaning than is the phrase 'probable cause'. Courts will have no difficulty in applying this standard and have frequently in the past referred to 'suspicion' or 'reasonable suspicion' as terms with a definite meaning, somewhat below probable cause on the scale of absolute knowledge of criminal activity" (R. 50).

[7] "By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard" (R. 51).

more than a visceral reaction on the police officer's part, and fails to provide any definitive objective standard. As Judge Van Voorhis stated below, in the companion case of *People* v. *Sibron*, 18 N.Y. 2d 603, 605, 272 N.Y. Supp. 2d 374, 376 (1966):

> "The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer."

Appellant respectfully contends that the statutory authority to conduct a search based upon the vague and amorphous standard of "reasonable suspicion", which simply stated consists of no more than a police officer's intuition, is repugnant to and in direct conflict with the Fourth Amendment prohibition against unreasonable searches and seizures.[8]

(b)

Arrest v. Detention

The majority below sought to justify the elimination of the Fourth Amendment requirement of probable cause by denominating the stopping of appellant as a *detention* rather than an *arrest*. The Court below, in upholding the validity of Section 180-a of the Code of Criminal Procedure stated,

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[8] *Henry* v. *United States*, 361 U.S. 98, 101 et seq. (1959); *United States* v. *Rios*, 364 U.S. 253, 261-262 (1960); *United States* v. *Rabinowitz*, 339 U.S. 56, 62-63 (1950).

"The statute makes it clear that the Legislature did not intend the stopping . . . to be an arrest."[9]

With all due respect for the opinion of the majority below, appellant submits that the statute does not make clear any such legislative intent as imported to it by the Court below.

Section 180-a of the Code of Criminal Procedure of the State of New York is contained within Chapter IV of the Code. That chapter is entitled, "Arrest by an Officer Without a Warrant". There can be no doubt that the activity authorized by Section 180-a of the Code of Criminal Procedure falls within the ambit of police activity known as an arrest. That this is the case is demonstrated not only by the title of the statutory chapter in which Section 180-a is contained, but also by the intrinsic nature of the police officer's authorized activity. It is that activity, as the Court below stated, which must be the ultimate gauge of the constitutionality of the statute.

Section 171 of the Code of Criminal Procedure states,

> "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."[10]

The weight of authority has held that as soon as dominion is exercised over the person an arrest takes place.[11]

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[9] R. 50.

[10] Code of Criminal Procedure, State of New York, Section 171. McKinney's Consolidated Laws of New York, Annotated.

[11] See Sobel, Hon. Nathan R., *Current Problems in the Law of Search and Seizure,* published under the auspices of the Kings County Criminal Bar Association, Gould Publications (1964).

Irrespective of the language employed, the opinion of the Court below must be read in the light of the *facts* presented by the record. With respect to the instant case, the question is posed, was an arrest of the appellant effectuated when Officer Lasky grabbed him by the shirt collar and pointed his drawn service revolver at him? No amount of semantic manipulation can avoid the obvious conclusion that the appellant was under arrest. It is respectfully submitted that any other conclusion defies the dictates of reason and common sense.

The question of the constitutionality of an arrest based upon "reasonable suspicion" instead of, and as opposed to, probable cause, still remains. In dealing precisely with this question, this Court has held,

> " . . . as the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, suspicion, *or even 'strong reason to suspect'* was not adequate to support a warrant for arrest. And that principle has survived to this day. . . . It was against this background that two scholars recently wrote, *'Arrest on mere suspicion collides violently with the basic human right of liberty.'*
>
> . . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, *it must be made with probable cause."* [12] (Emphasis supplied.)

Even if one were to assume, *arguendo,* that the level of restraint imposed on the appellant did not constitute an

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[12] *Henry* v. *United States,* 361 U.S. 98, 101 et seq. (1959).

arrest, we are still left with the irrefutable proposition that "reasonable suspicion" is an inadequate constitutional standard for the authorization of a search and seizure. This Court in *United States* v. *Rabinowitz,* held that a search may be upheld if conducted as incident to a lawful arrest.[13] That principle cannot be extended, as the Court of Appeals of New York apparently has assumed, to sustain a search as incident to a detention on less than probable cause.

(c)

Frisk v. Search

The Fourth Amendment requirement of *probable cause* cannot be circumvented by the semantic device of labeling a search a *frisk.* Although the language of Section 180-a of the Code of Criminal Procedure employs the term "search" and makes no reference to a so-called "frisk", the Court of Appeals of the State of New York has nonetheless sought to distinguish the conduct of the police officer in the instant case as a "frisk" rather than a search. The majority below restated its position as previously enunciated in *Peo.* v. *Rivera,* 14 N.Y. 2d 441, 446 (1964):

> "In *Rivera,* we went to some length to distinguish a frisk from a full search: 'It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic

[13] *United States* v. *Rabinowitz,* 339 U.S. 56, 62-63 (1950).

grounds from the degree of constitutional protection that would surround a full blown search of the person." [14]

Stated alternatively, the Court of Appeals of the State of New York has sought to justify withholding the protection of the Fourth Amendment by distinguishing between a "limited search" and an extensive or "full blown search". It is appellant's respectful contention that the Fourth and Fourteenth Amendments of the Constitution of the United States do not permit any distinction to be made between a "limited" and a "full blown search". Moreover, the New York Court of Appeals, although speaking in terms of limited searches, has by decision authorized, under the guise of the term "frisk", searches which are unrestricted in every conventional sense of the word. In the companion case of *People* v. *Sibron,* the Court of Appeals held valid a so-called "frisk" where a police officer put his hand *into* a suspect's pocket.[15] An even further extension of the term "frisk" is found in *People* v. *Pugach,* 15 N.Y. 2d 65 (1965), *cert. den.,* 380 U.S. 936 (1965), where the Court permitted the search of a suspect's briefcase as part of a so-called "frisk". Paraphrasing a familiar quotation—a search by any other name is still a search. Indeed, Webster's New Collegiate Dictionary (6th ed.), at page 333, defines a "frisk" as follows:

"... To *search* (a person) by running the hand over the clothing, through the pockets, etc.; ..." (Emphasis supplied.)

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[14] R. 51.

[15] *People* v. *Sibron,* 18 N.Y. 2d 603, 604.

Numerous courts have squarely held that a frisk of the accused for weapons is indistinguishable from a "full blown" search of the person.[16]

This Court in its decision in *Mapp,* noted that it is the individual's right to privacy which is embodied in the Fourth Amendment of the Constitution of the United States and which is made enforceable against the States by the Due Process Clause of the Fourth Amendment of the Constitution of the United States.[17]

Appellant respectfully submits that irrespective of the semantics employed, it is just as much a search, and an affront to the individual's right of privacy to run one's hands over a person's pockets as to place one's hands inside of them. The Court of Appeals of the State of New York while recognizing that such conduct constitutes an "invasion of privacy" has, by semantic gymnastics, withheld the protection of the Fourth Amendment of the United States Constitution from appellant.[18] As construed by the majority below, Section 180-a of the Code of Criminal Procedure of the State of New York is on its face, and as applied to the facts of this case, clearly repugnant to the Fourth Amendment proscription against unreasonable searches and seizures.

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[16] *White* v. *United States,* 271 Fed. 2d 829 (D.C. Cir., 1959); *State* v. *Collins,* 150 Conn. 488, 491-492 (1963); *Ellis* v. *United States,* 264 Fed. 2d 372, 374 (D.C. Cir., 1959), *cert. denied,* 359 U.S. 948.

[17] *Mapp* v. *Ohio,* 367 U.S. 643, 659 (1961).

[18] R. 51.

II.

The Search and Seizure in the Instant Case Was Incident to an Unlawful Arrest and Constituted a Violation of Appellant's Rights Under the Fourth and Fourteenth Amendments.

The Court of Appeals of New York by its prior decision in *People* v. *Rivera,* 14 N.Y. 2d 441 (1964) authorized the frisking of an accused as a self-protective measure under circumstances construed by that Court to be less than those which would constitute an arrest. In the instant case, the New York Court of Appeals equated the action authorized by Section 180-a of the Code of Criminal Procedure with the action sanctioned by that Court in the *Rivera* case.[19] As hereinabove set forth, it is appellant's contention that Section 180-a of the Code of Criminal Procedure of the State of New York is repugnant to and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States. Similarly, and upon the same grounds, appellant contends that the conduct sanctioned by the New York Court of Appeals in the *Rivera* case is unconstitutional.

The search and seizure in the instant case cannot be sustained even if one were to accept, *arguendo,* the position of the New York Court of Appeals with respect to the *Rivera* case and Section 180-a of the Code of Criminal Procedure.

The search or "frisk" of appellant was conducted as an incident to an *unlawful arrest* and *assault* committed upon him by the police officer, and as such it far exceeded the

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[19] R. 50.

bounds authorized by the decision of the New York Court of Appeals in the *Rivera* case, and the statutory authority set forth in Section 180-a of the Code of Criminal Procedure of the State of New York.

The record is abundantly clear that the police officer had observed nothing which could give rise to a *reasonable* suspicion that the appellant was a person who was committing, had committed, or was about to commit a felony, etc. The officer's testimony was to the effect that he observed the appellant "tiptoeing" through the hallway of the premises (R. 15, 20). Counsel respectfully suggests that walking through a hallway of an apartment house dwelling in the middle of the afternoon, irrespective of the manner of one's gait, is scarcely a sufficient basis to give rise to a *reasonable* suspicion as to the commission or the imminence of the commission of a crime, as required by the statute.

Moreover, the record (R. 15, 16, 20, 21) clearly indicates that the defendant was not stopped for questioning as contemplated by either Section 180-a of the Code of Criminal Procedure of the State of New York, or by the decision of the New York Court of Appeals in the *Rivera* case.[20] On the contrary, prior to any questioning, the police officer in the instant case grabbed the appellant by the shirt collar while pointing his drawn revolver at appellant. Such con-

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[20] Parenthetically, it may be noted that this Court's decision in *Miranda* v. *State of Arizona*, 384 U.S. 436 (1966) (decided June 13, 1966, approximately four weeks after the argument of the instant case before the New York Court of Appeals) raises substantial questions as to whether or not appellant was deprived of his constitutional right to remain silent, and as to whether or not the questioning authorized by Section 180-a of the Code of Criminal Procedure of the State of New York is repugnant to and in violation of the Fifth and Sixth Amendments of the Constitution of the United States.

duct on the part of the police officer, in the absence of probable cause for believing appellant had committed a crime or was about to commit a crime, constituted an *assault*—or at the very least—an *unlawful arrest*. This Court has clearly held that evidence seized as an incident to an unlawful arrest cannot be used against a defendant.[21]

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[21] *United States* v. *Rios*, 364 U.S. 253 (1960): In this case, an unresolved conflict existed in the testimony as to the circumstances surrounding the discovery of contraband in the defendant's possession. It was the testimony of the police officers that they approached the defendant while he was seated in a taxi cab which was stopped for a traffic light, and that upon one of the officers identifying himself as a policeman, the defendant dropped the package, which was recognized by the police officers as contraband, to the floor of the taxi. Thereupon, the police officers claimed that they opened the door of the taxi cab and arrested the defendant. However, the driver of the taxi cab testified that one of the police officers approached the taxi cab and with his drawn revolver "took hold of the defendant's arm while he was still in the cab" and before he dropped the package of narcotics (364 U.S. 257-258). This Court vacated and remanded the case in order that there might be a resolution of the conflicting testimony, it being unmistakenly clear in the opinion of this Court that if the taxi cab driver's version of the facts were found to be the truth, then the contraband in question was unlawfully seized. This Court stated at 364 U.S. 261-62:

> "The seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. . . . Here justification is primarily sought upon the claim that the search was an incident to a lawful arrest. Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approached the taxi in which the petitioner was riding. . . . If, therefore, the arrest occurred when the officers took their positions at the door of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident."

There is a striking similarity in the disputed testimony in the *Rios* case to the undisputed facts which attended the search of the appellant in the instant case. The only difference being that instead

Additionally, it must be noted that the record in the instant case is absolutely barren of any testimony to indicate that the police officer reasonably (or unreasonably) suspected that his life or limb was endangered. The testimony clearly shows that the police officer had nothing to fear with respect to his personal safety. That he had the appellant under his control at all times and that he had not only seized the appellant by the shirt collar, but he additionally had the appellant subject to the authority of his pointed revolver (R. 15, 16, 20, 21).

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of merely holding the defendant by the arm as occurred in *Rios*, the police officer in the instant case grabbed the appellant by the shirt collar.

See also:

United States v. *Scott*, 149 F. Supp. 837, 840 (D.D.C. 1957):

"The word 'arrest' has a well-defined meaning, the essence of which is a restriction of the right of locomotion or a restraint of the person."

United States v. *Viale*, 312 F. 2d 595, 601 (2d Cir. [1963]):

"When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

Henry v. *United States*, 361 U.S. 98, 103 (1959).

N. Y. Code of Crim. Proc. Sections 167, 171.

People v. *Cassone*, 35 Misc. 2d 699, 230 N.Y.S. 2d 822 (1962), *rev'd in part on other grounds*, 20 A.D. 2d 118, 245 N.Y.S. 2d 843, aff'd 14 N.Y. 2d 798, 251 N.Y.S. 2d 33, *cert. denied*, 379 U.S. 892 (approaching a suspect with drawn guns held to constitute an arrest).

Royne, *"The Right to Investigate and New York's 'Stop and Frisk' Law,"* 33 Fordham L. Rev. 211, 237-38 (1964) (where police approach a suspect with drawn guns, "most courts would hold this to be an immediate arrest and would require probable cause for an arrest at the instant of approach").

50 Cornell L.Q. 529, 536 n. 58 and accompanying text (1965) (approaching a suspect with drawn guns constitutes an assault and is "more objectionable than a frisk").

Appellant submits that irrespective of the constitutionality of Section 180-a of the Code of Criminal Procedure of the State of New York and irrespective of the constitutionality of the conduct sanctioned by the New York Court of Appeals in *People* v. *Rivera, supra,* that the police officer's conduct in the instant case constituted an outrageous violation of the rights afforded appellant under the Fourth and Fourteenth Amendments of the Constitution of the United States.

Conclusion

In his dissent below, Judge Fuld characterized Section 180-a of the Code of Criminal Procedure of the State of New York as a "green light to abuse", an "outright invitation to evade the constitutional prohibition against unreasonable searches", and as a device to "circumvent" the exclusionary rule enunciated by this Court in *Mapp* v. *Ohio.*[22]

This Court stated in *Mapp* v. *Ohio:*[23]

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process

[22] R. 55.

[23] *Mapp* v. *Ohio,* 367 U.S. 647, 660 (1961).

> Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."

To acknowledge appellant's constitutional rights, embodied in the Fourth and Fourteenth Amendments, and to permit the revocation of those rights upon the "whim of any police officer who, in the name of law enforcement" chooses to suspend them, would be tantamount to the eradication of those rights.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed, the evidence seized from the appellant suppressed, and the indictment dismissed.

Respectfully submitted,

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